IN THE

Supreme Court of United States

OCTOBER TERM, 1942.

No.....

THOMAS H. SWOPE AND VIRGINIA McALPINE, PETITIONERS AND APPELLANTS BELOW,

VS.

KANSAS CITY, KANSAS, a municipal corporation; ROY WHEAT, FRANK BROWN and FRANK H. HOLCOMB, County Commissioners of Wyandotte County, Kansas; UNION PACIFIC RAILROAD COMPANY, a corporation; and the MINNESOTA AVENUE, INC., a corporation, RESPONDENTS AND APPELLEES BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Tenth Circuit, filed December 31st, 1942, is a final judgment and is reported in 132 Fed. (2d) 788.

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds appear as part of the foregoing Petition for Writ of Certiorari, and are hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

This statement also appears as part of the foregoing Petition for Writ of Certiorari, and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in ruling that the opening of the greater part of the dedicated land, under statutory authority, to private uses, unlimited in character, did not, as to such part of the land, constitute a lawful abandonment of the dedication use and purpose.

(2) The Circuit Court of Appeals erred in ruling that the above private uses are promotive of and consistent with the purpose of the dedication.

(3) The Court of Appeals erred in ruling that in devoting the levee tract to such private uses the respondent city acted within its discretionary powers as trustee of the levee property.

(4) The opinion of the Circuit Court of Appeals is in direct conflict with *Juneau Ferry Co.* v. *Morgan,* 236 Fed. 204 (9th Circuit).

(5) The Court erred in relying upon the case of *Kansas City* v. *Woods,* 117 Kan. 141, 230 Pac. 79, as stare decisis, although these petitioners were not parties to that litigation.

E.

SUMMARY OF THE ARGUMENT.

Point I.

When the State of Kansas in 1929 enacted the Act whereby the City was authorized to divide this levee property into two parts, and to allocate the riverward part to "public landing and public docks and wharf", and the remainder to industrial uses, the State, the high guardian of the public and public rights, abandoned the public use in such remainder. This statute, although pressed upon the attention of the trial court and the appellate court, was ignored by both courts.

Point II.

The private commercial and industrial activities on the levee property, disclosed on this record, are not levee uses or promotive of such uses.

Point III.

The respondent City in developing the levee tract was not acting as trustee for the public, but as a private owner for its own benefit, and that of Union Pacific and other tenants of the City.

Point IV.

The opinion of the Circuit Court of Appeals is in direct conflict with the opinion in Juneau Ferry Co. v. Morgan, 236 Fed. 204 (9th Cir.).

Point V.

Under the Federal Constitution a person may not be deprived of his contract rights through an adjudication of those rights in an action between other parties, to which action he was a stranger.

ARGUMENT.

Point I.

The Kansas Act of 1929, though ignored below, is of decisive importance. This act *defines* true levee uses, allocates part of the tract to such uses, and allocates the residue to non-levee uses. As clearly as the English language can convey thought and purpose, the State has spoken to Kansas City, and said: "Preserve the public use along the river to the extent you deem wise, use any remainder for your own purpose and benefit." The State, all powerful in that respect, cancelled the public use lien on most of this land and made the trustee thereof a *beneficiary*. The City accepted the gift and proceeded with its plan. That plan this Court has considered.

> (*Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 61 S. C. 1064, 85 L. Ed. 1512).

It was carried out. It was one, said the Supreme Court of Kansas, which looked to "a *permanently* successful *municipal* enterprise—in its quasi—*private or proprietory* capacity."

> (*State ex rel.* v. *City of Kansas City*, 151 Kan. 2, 98 Pac. (2d) 101).

This late Kansas case and this Kansas statute demonstrate, we argue, that the State abandoned the public use in part of the tract, and the City took it over to its own private advantage. This part of the land was abandoned for public levee use. It was abandoned for any and all other public purposes. A member of the public, unless invited, would now be a trespasser if found on this tract.

It seems idle to argue that property exploited for private ends can ever serve a public trust. The buildings and railyard are permanent in character, built for a long tomorrow. The Statute of 1929 authorizes industrial use leases up to 99 years. The statute would authorize consecutive 99 year leases. That means perpetuity. As said in *Commissioners* v. *Lathrop,* 9 Kan. 453: "The use contemplated is not temporary but permanent."

The State could not put this land, dedicated for a public use, to any other use, public or private, without the consent of the dedicators. (*State ex rel.* v. *City of Manhattan,* 115 Kan. 794, 225 Pac. 85).

The State could, however, abandon this public use (*McAlpine* v. *Railway Company,* 68 Kan. 207, 75 Pac. 73; 18 C. J. 125; 26 C. J. S. 153; *Young* v. *Board,* 51 Fed. 585; *Porter* v. *Bridge Co.,* 200 N. Y. 234, 93 N. E. 716) or devote the property to alien uses, but this only upon the terms of compensating the dedicators (26 C. J. S. 140, 154, 155), and such compensation is implicit in the 1929 Act, for the dedication purpose has been erased by abandonment.

The Kansas Legislature gave power to the defendant city to lease this dedicated levee to private industrial enterprises. It is our position that neither the city nor the legislature, acting separately or together, could, in defiance of the contract of dedication and the rights of the dedicators thereunder, and without compensation, divert this levee to inconsistent, alien, non-levee uses. *State ex rel.* v. *City of Manhattan,* 115 Kan. 794, 225 Pac. 85. We contend further, however, that the Legislature may—and may so authorize a city—abandon any public use based upon a dedication. The vacating of dedicated highways and streets is a familiar example. And here the legislature granted the power—and the city accepted

it and acted on it—to waive and abandon the use of this levee for levee purposes, and to devote the levee to other activities. The result, we argue, was a *lawful abandonment* of the dedication uses, and the result of such abandonment is that the dedicators must be paid the reasonable value of the naked land so abandoned.

> "It would be unjust that the public should retain the use for any other purpose than the one for which it was dedicated."
>
> *Campbell* v. *Kansas City,* 102 Mo. 326, 344, 13 S. W. 897.

As to this very levee, the Supreme Court of Kansas has approved this rule: "Land dedicated to a particular purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made or when the dedication has spent its force by the use becoming impossible—or so highly improbable as closely to approach the impossible."

(*McAlpine* v. *Railway,* 68 Kan. 207, 75 Pac. 73).

In the McAlpine case it was ruled that mere non-user will not cause reverter of dedicated land. It was also ruled that the mis-uses therein described would not cause such reverter for they could be removed by a court of equity. The mis-uses in the McAlpine case were of temporary nature. They were described in a later case as existing by "sufferance" (*Kansas City* v. *Woods,* 117 Kan. 141, 230 Pac. 79).

They were not founded as is the fact here, upon a legislative Act like that of 1929. There was hence no "lawful" abandonment. In the McAlpine case the *dedicatee* alone sanctioned the mis-use and drew this from the Court: "Certain it is that neither city nor county could give away the rights of the public—by authorizing its use for unwarranted purposes."

Only the Legislature, of course, can abandon a public trust. It has done so here. The Circuit Court of Appeals notes that in the McAlpine case it was ruled that "levee" uses included streets for access to the levee and likewise "dykes". The answer to that is that the Act of 1929, and the building program that followed, has made the use of that much of the tract *for all those three uses*, "impossible—or so highly improbable as closely to approach the impossible" (McAlpine case), and hence amounts to "abandonment" for each and all of those three public use purposes.

Point II.

The Circuit Court of Appeals ruled that no "abandonment" occurred here for that the present uses are promotive of the public use of all of this tract as a levee. In support the McAlpine case is cited and quoted, also *Kansas City* v. *Woods*, 117 Kan. 141, 230 Pac. 79.

As we read the McAlpine opinion, and as it has been viewed by the many non-Kansas courts that have cited it, that opinion does not rule that temporary factories, squatters, or encroaching rail tracks are true levee uses. On the contrary, had that been the view of the Court it would not have gone beyond that point, decisive of the entire controversy, to waste time and space upon the considerations upon which the case in truth was *decided*. Nor would the Court have gone out of its way to denounce municipal sanctions of purprestures and point to the remedy.

As to the Woods case, the Woods plan fell through even though the Kansas courts gave it approval. But what was the Woods plans and purpose? The plan was that Woods Bros. should do what the City had failed to do; viz: establish a levee in being, a Kansas City port

in being. For a short term of years Woods Bros. were to retain control of the levee, subleasing various parts to others, including industrial plants. What sort of industries is not disclosed in the opinion. They are only casually referred to. Some industry would not be in conflict with levee uses, say, warehouses and elevators for temporary storage in river-land transportation. During the term of the lease every part of the tract was to be subject to the paramount demands of navigation and levee. At the end of the term Woods Bros. and their sub-lessees were to remove, and leave a finished levee, a port, in actual being. To secure the building of such a port was the professed aim of all concerned in asking the Court for its approval. That purpose and that alone, filled the mind of the Court. And so the Court, while strongly adhering to the horn book law that "property dedicated for public use can neither be sold, *leased*, or otherwise diverted from the original purpose", concluded to apply "a rule of reason", and considered that, under "the facts" before it, the plan it approved was a valid "exercise of the administrative discretion vested in the City Government", and that the transaction was not "*commercial* rather than governmental."

This Court (*Union Pac. R. R.* v. *United States*, 313 S. W. 450, 61 S. C. 1064, 85 L. Ed. 1512) and the Kansas Supreme Court (*State ex rel.* v. *Kansas City*, 151 Kan. 2, 98 Pac. (2d) 101), have both stamped the present enterprise as one purely commercial.

The plan in the Woods case was to create and preserve an improved levee. The food market—rail yard plan blocks such a purpose permanently.

The Circuit Court of Appeals also cites and relies on *State ex rel.* v. *Dreyer*, 229 Mo. 201, 129 S. W. 904. That case is the farthest point that the courts have

reached in upholding misuser of dedicated levees. It sanctioned "passing" railtracks on the levee at Hannibal, Missouri. The Dreyer case, however, also decided that the levee could not lawfully be occupied "with depots, warehouses or other structures", and that there could be no "switching upon said tracks" permitted. In the instant case, about a fifth of this levee is now in control of respondent railway company. The site was donated and intended for the promotion of river transportation. The inherent antagonist of such transportation, its great rival, is the railway. And now the respondent uses the site for rail borne goods that come from no boats and go to no boats. The site is being used not only for the rail yard, but the greater part is covered with buildings in which every kind of private enterprise is pursued. Yet it is ruled, below, that all this is promotive of the levee purpose. That means that *any* use is a levee use, within the terms of this dedication and the Act of 1859. That is why a question of great importance is here involved. If the Circuit Court of Appeals is right, then every dedication for a *specific* purpose becomes automatically a dedication for *all* purposes. The result will be that the law of abandonment, diverter and misuse of dedicated property will be stored away for good, and carry with it many notable decisions. A "levee" is a place devoted to the loading and unloading of freight, and the reception and discharge of passengers to and from vessels in adjacent rivers or other navigable waters. (*New Orleans* v. *United States*, 10 Peters 662). The following uses have been held to be misuses of levees: "A permanent and substantial depot" (*Barney* v. *Keokuk*, 94 U. S. 324); "Sidings and switches" of a railway company, not pertaining to the company's river traffic. (*C. R. I. & P. R. Co.* v. *People*, 222 Ill. 427, 78 N. E. 790); a grocery store (*Gardiner* v. *Tisdale*, 2 Wis. l. c. 188); a railway com-

pany's freight house (*City of St. Paul* v. *C. M. & S. P. Ry. Co.*, 63 Minn. 330, 68 N. W. 458); factories (*Sanborn* v. *Van Duyne*, 90 Minn. 215, 96 N. W. 41); a railroad company's bridge approach over the levee (*Louisville, et al. Ry. Co.* v. *City of Cincinnati*, 76 Ohio St. 481, 81 N. E. 983); a privately operated coal hoist (*Richard* v. *Flinn*, 189 Pa. 355, 42 Atl. 23); a lumberyard (*McCann* v. *Inhabitants*, 107 Me. 393, 78 Atl. 465); a city hall (*Streuber* v. *Alton*, 319 Ill. 43, 149 N. E. 577); a bathhouse (*Poole* v. *Commissioners*, 9 Del. Ch. 192, 80 Atl. 683); buildings (*Attorney General* v. *Tarr*, 148 Mass. 309; 19 N. E. 358); the railyard of a railway company (*Betcher* v. *Railway Co.*, 110 Minn. 228, 124 N. W. 1096); an ice house (*People* v. *Daxcee*, 136 App. Div. 400, 120 N. Y. S. 962); a privately owned and controlled grain elevator (*Belcher Co.* v. *Elevator Co.*, 82 Mo. 121).

All the law on the subject runs that a public levee is for the use of all members of the public, and cannot be diverted to private uses, for such necessarily would interfere with the free, perpetual, public and unrestrained use by the whole community.

Point III.

The Circuit Court of Appeals ruled that the acts of the city are well within its discretionary powers as trustee of this trust property. What we have said under Points I and II is likewise directed to this ruling and we call attention to the 1859 Act. Under that Act the City holds the levee property in trust for levee purposes, and only for that purpose. That Act controls this dedication contract. It is clear, as this Court and the Kansas Supreme Court have found to be the case, that the City, accepting the benefits of the 1929 Act, has shifted its status from that of a trustee of a

public trust to that of an unfettered owner. It has not been acting in any trust capacity. It and the Union Pacific have acted for their own pockets.

The opinion of the Circuit Court of Appeals lays stress upon the thought that pending the demand for levee use of this tract, it should be used for something and not left as a potential nuisance. This argument has been advanced without effect in defense of misuses of levees. (*City of St. Paul* v. *Railway Co.*, 63 Minn. 330, 63 N. W. 458; *Attorney General* v. *Tarr*, 148 Mass. 309, 19 N. E. 358; *City of St. Paul* v. *Railway Co.*, 65 N. W. 648).

If a dedicatee, for any reason, does not want to use the dedicated property for dedication purposes, the obvious thing to do is to turn back the gift.

And the 1929 Act and the City's acts thereunder, demonstrate that neither State nor City contemplated or intended any future levee use of the diverted tract. The State authorized successive 99 industrial purpose leases. The City, thus fortified, built non-levee buildings to last for ages. The City definitely decided that all its present and future needs for docks were filled when it built that tiny dock. Of course, it is always physically possible to raze these buildings and return the land to levee uses. No one would seriously have any faith in such a happening here, for every act of State and City point the other way. Such a possibility is, anyhow, no answer to the charge of abandonment, and no sufficient basis for the public trust to rest upon. For until the end of recorded time, throughout the future years of usurpation of this tract, the argument could and would be repeated that the land was not yet needed for levee uses. If that argument is sound there never could be any "abandonment" of

dedication uses. A purely fanciful and hypothetical restoration to levee use at some hypothetical future date is no answer to this fundamental breach of the dedication contract.

Point IV.

The opinion of the Circuit Court of Appeals conflicts with the opinion of *Juneau Ferry Co.* v. *Morgan,* 236 Fed. 204 (9th Cir.) where the Court said:

> "A town cannot lease a part of a public dock to a private concern, nor can a city which has condemned private property for use as a wharf lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain."

On this record it is clear that under the present set up, and for the foreseeable future, the vast buildings on this tract will be filled with a locust swarm of private profit seekers.

Point V.

The opinion of the Circuit Court of Appeals interprets the Woods case opinion, *supra,* directly contrary to our interpretation of it. If the Court's interpretation is the correct one, then the use here against these petitioners of the Woods case as stare decisis raises a serious question under the Federal Constitution. It is this: Could the City, in a friendly action brought against it by the State, and to which action the dedicators were not made parties, secure an adjudication foreclosing any right of the dedicators? Could the City thus, escaping all risks that attend the securing of res judicata, secure the equally potent stare decisis?

Under the ruling in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431, 54 S. C. 475, any of the levee

dedicators was "entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him." Elementary justice demands that litigants be not permitted to destroy the rights of a third party under a contract with one of the litigants. The petitioners have pleaded the impairment of obligation clause of the Federal Constitution, and Section One of the Fourteenth Amendment thereof. Neither of these may be violated by State action, whether legislative, executive or judicial. Such violations raise federal questions not within the rule in the *Erie-Tompkins* case, 304 U. S. 64.

We submit that under the ruling in *Chase National Bank* case, *supra,* the Woods case opinion, as construed by the Circuit Court of Appeals cannot be used against these petitioners.

ERRORS OF FACT IN THE OPINION BELOW.

1.

The opinion recites that the levee tract has grown by accretion to several times its original size. There is not a trace of evidence in the record to sustain this assertion. The accretions were to the east. The north, south, and west lines remained static. In the McAlpine case (*supra*) the Court found that the tract, when dedicated, was, as now, one mile long, and that it was 700 to 900 feet in width. An average of 800 feet in width, would make the tract about 100 acres in area, as compared with the 105 acres that the Court below, again without any evidence, asserts is the present area of the tract.

2.

The opinion below states that petitioners claim to be seized of such reversionary title. The petitioners

never made any claim other than that they ought in equity and good conscience to be paid the ground value of the land diverted.

Conclusion.

There are presented here questions of grave public importance. In this day of so many private dedications made for public purposes, it would be well that this Court review the law pertaining thereto.

Respectfully submitted,

WM. H. MCCAMISH,
Counsel for Petitioners.